IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

SA.No. 183 of 1994()

(AGAINST THE JUDGMENT AND DECREE IN AS.45/1991 DATED 25/06/93 of DISTRICT COURT, ALAPPUZHA ARISING THE JUDGMENT AND DECREE IN OS.385/1986 DATED 30/11/1989 OF MUNSIFF'S COURT AT ALAPPUZHA)

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APPELLANT: APPELLANT:PLAINTIFF:

M.S.SUSHEELA,
UTHARAYAN TAGORE GARDENS,
MADTHUVILAKAM, THIRUVANANTHAPURAM, REPRESENTED BY HER POWER OF ATTORNEY HOLDER V.JAYACHANDRAN OF ....DO.....

BY ADV. SRI.V.GIRI

RESPONDENTS: RESPONDENTS:DEFENDANTS:

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1. **THE STATE OF KERALA, REPRESENTED BY THE DISTRICT COLLECTOR, ALAPPUZHA.**

2. **THE BOARD OF REVENUE,**
KERALA STATE REPRESENTED BY ITS SECRETARY,
OFFICE OF THE BOARD OF REVENUE,
THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SMT. LATHA THANKAPPAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 3/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.183 OF 1994

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Dated this the 3rd day of July, 2007

JUDGMENT

Plaintiff in O.S.385/1986 on the file of Munsiff Court, Alapuzha is the appellant. Defendants are the respondents. Suit was instituted seeking a decree for settlement of accounts and permanent injunction. Appellant was the Abkari contractor who enjoyed the privilege of sale of arrack in shop Nos.5,6,7, 11 to 14 of Abkari range during the year 1984-85. According to appellant, the monthly quota to be supplied was 5140 litres of arrack and Government has also an obligation to supply additional quota of arrack as and when demanded, but Government failed to supply the monthly quota for the month of February 1985 and additional quota as demanded by the appellant and because of the violation of the statutory and contractual obligations, appellant sustained loss and therefore appellant is entitled to recover

damages. Contending that the demand for realisation of Rs.6,87,730.50 by the State as the balance kist amount is not correct and she is entitled to the damages caused for the non-supply of arrack, appellant sought a settlement of accounts and for a permanent prohibitory injunction restraining respondents from realising the amount by recourse to the provisions of Revenue Recovery Act. Respondents resisted the suit contending that the monthly quota for February, 1985 was supplied and Government has an obligation to supply only the monthly quota and there is no obligation to supply additional quota as and when demanded and therefore appellant is not entitled to claim damages and State is entitled to realise the balance kist amount under the provisions of Revenue Recovery Act. Learned Munsiff on the evidence of Pws 1to 4 and Exts.A1, A2 and X1 and X2 series found that appellant is not entitled to any damages on account of the failure of the Government to supply the monthly quota for the month of February, 1985 or

additional quota as demanded and State is entitled to realise the balance kist amount under the provisions of Revenue Recovery Act and dismissed the suit. It was challenged before District Court, Alapuzha in A.S.45/91. On reappreciation of evidence, learned District Judge found that there was non-supply of monthly quota during February, 1985 but as the appellant did not rescind the contract and by enjoying the contract she signified her acquiescence and hence is not entitled to claim damages for the non-supply of the monthly quota during February, 1985. Learned District Judge relying on the decision of this Court in **Krishnan v.State of Kerala (1985 K.L.T.1159) and Devassya v. Asst. Excise Commissioner (1987(1) KLT 244)** found that the contract in the case was in accordance with the modified conditions, which does not provide an obligation to supply additional quota as and when demanded and for the non-supply of additional

quantity of arrack demanded by the appellant,she is not entitled to claim damages. Learned District Judge also found that respondents are entitled to realise the balance kist amount under the provisions of Revenue Recovery Act as held by this court in **Gourikutty Amma v. Dist.Collector, Alleppey (1975 KLT 29)** and dismissed the appeal. It is challenged in this Second Appeal.

2. Second appeal was admitted formulating the following substantial questions of law.

1) When there is default on the part of defendants in satisfying its obligations under a contract, resulting in damage to the plaintiff and damages is not quantified, will not the plaintiff be entitled to sue for settlement of accounts, when money is claimed as against plaintiff also?

2) When plaintiff is not a defaulter as defined under the Kerala Revenue Recovery Act, is there any bar for the suit under section 72 of Kerala Revenue Recovery Act?

3) Is not the suit competent under section 81 of the Revenue Recovery Act?

3. The learned counsel appearing for appellant and respondents were heard.

4. Learned counsel appearing for appellant in view of the decision of the Apex Court in **Assistant Excise Commissioner v. Issac Peter (1994(1) KLT 698)** did not dispute the findings of the courts below that for the failure to supply additional quota of arrack, appellant is not entitled to claim damages. But it was argued that the decision is not applicable in respect of non-supply of monthly quota and as monthly quota for February, 1985 was not supplied, appellant is entitled to get damages and to that extent a decree should have been granted.

5. Learned Government pleader argued that even if the appellant sustained any damages for non-supply of monthly quota for February, 1985 she should have rescinded from the contract and

claimed damages and as she enjoyed the benefit of the contract for the entire period, she is not entitled to claim damages later and first appellate court rightly non-suited the appellant.

6. Though respondents contended that monthly quota for the month of February, 1985 was supplied, first appellate court on the evidence entered a factual finding that the monthly quota for February, 1985 was not supplied. But on the evidence it was found that monthly quota for the subsequent months from March 1985 was supplied. First appellate court also found that appellant did not rescind the contract for the non-supply of monthly quota during February, 1985 and without rescinding from the contract, she is not entitled to claim damages as she is acquiesced to it by her conduct. That finding is perfectly correct.

7. As Government has no obligation to supply additional quantity of arrack as and when demanded and though monthly quota was not supplied for one month appellant did not rescind the contract and

enjoyed the benefit of the cotnract, and she is not entitled to turn round later and claim damages. Therefore appellant is not entitled to contend that respondents are not entitled to realise the amount or the accounts are to be settled before recovery. A settlement of accounts is warranted only if appellant is entitled to get damages. As appellant is not entitled to any damages she is not entitled to claim settlement of accounts also.

8. As held by the Division Bench decision of this Court in Gourikutty Amma v. Dist.Collector, Alleppey (1975 KLT 29) (supra) the balance kist amount due under the Abkari Act is recoverable as if they are land revenue. Appellant is not entitled to contend that a decree for injunction from realisation of the amount is to be granted. The State is entitled to realise the balance kist amount by recourse to Kerala Revenue Recovery Act and in view of Section 72 of Kerala Revenue Recovery Act the suit is not maintainable. Learned counsel appearing for appellant submitted that

appellant had paid the amount for the monthly quota of February, 1985 though monthly quota was supplied and therefore that amount has to be adjusted towards the balance amount payable by him. If that amount was not adjusted as claimed by the appellant, State is to adjust the amount.

Second Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.183 /1994

JUDGMENT

3RD JULY, 2007